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Nos. 91-744 and 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners/Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents/Cross-Petitioners.

On Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF LIFE ISSUES INSTITUTE SUPPORTING RESPONDENTS/CROSS-PETITIONERS

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

QUESTIONS DEALT WITH HEREIN

1. Does the equal protection clause protect an abortion right or invalidate the Pennsylvania spousal notice provision?

2. Does the ninth amendment protect an abortion right or prevent overruling of *Roe v. Wade*?

3. Is a remand required to consider the Pennsylvania Abortion Control Act under an altered standard of review or for consideration of asserted alternative constitutional bases for the abortion right?

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BRIEF AMICUS CURIAE OF LIFE ISSUES INSTITUTE SUPPORTING RESPONDENTS/CROSS-PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Life Issues Institute is a non-profit corporation based in Cincinnati, Ohio. Dr. John C. Willke, past president of the National Right to Life Committee and current president of International Right to Life, is president of Life Issues Institute. The goal of Life Issues Institute is to return full protection to all living humans, including the unborn, under the law. Life Issues Institute works to achieve this goal by serving the education needs of those dedicated to restricting abortion on demand throughout pregnancy, as imposed on the American people by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Life Issues Institute seeks to return legal protection to the unborn by this brief amicus curiae.

SUMMARY OF THE ARGUMENT

Planned Parenthood of Southeastern Pennsylvania et al. interweave with their fourteenth amendment privacy arguments equal protection arguments. However, equal protection provides no shelter for an abortion right and no provision of the Pennsylvania Abortion Control Act is unconstitutional on equal protection principles. Certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania et al. also urge that there is a ninth amendment right to abortion. The ninth amendment provides no support for an abortion rights and does not counsel against overruling

[1]This brief is filed with permission of all the parties. Letters indicating this permission have been filed with the Clerk of this Court. Life Issues Institute gratefully acknowledges funding for this brief by a grant from the Lee Corporation, Indianapolis, Indiana, M. Monroe Lee, President.

Roe v. Wade. Finally, Planned Parenthood of Southeastern Pennsylvania et al. argue that a remand for further fact-finding and application of any lower standard of review is necessary in the event this Court establishes a different standard of review than that of *Roe v. Wade*. This is unnecessary and would be a waste of judicial resources, as would be a remand for consideration of constitutionality under alternative constitutional theories. This Court may and should resolve all such matters before it.

ARGUMENT

I. The Equal Protection Doctrine Neither Provides a Constitutional Shelter for the Right to Abortion Nor Invalidates Pennsylvania's Spousal Notice Statute.

Planned Parenthood of Southeastern Pennsylvania (et al.) (hereinafter Planned Parenthood) asserts repeatedly in its brief that restricting abortion by statute is a violation of the fourteenth amendment guarantee of equal protection.[2] *See, e.g.*, Brief for Petitioners/Cross-Respondents at 15-16, 19 n.27, 33, 39, 40, 46-48. Of course, *Roe v. Wade*, 410 U.S. 113, was decided on a fourteenth amendment privacy theory, *id.* at 153, as was the case at bar in the lower courts. *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991) (Appendix to Petition for a Writ of Certiorari in No. 91-744 at 1a); *Planned Parenthood v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990) (Appendix to Petition for a Writ of Certiorari in No. 91-744 at 104a).

However, Planned Parenthood seems concerned that the privacy underpinning of *Roe* cannot stand up under rigorous scrutiny. Therefore, it interweaves notions of equal protection theory with its privacy arguments, perhaps hoping that an

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[2]The Fourteenth Amendment states in relevant part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

abortion privacy right will be less likely to be abandoned if some other constitutional principle can be shown to support a right to abortion on demand anyway.

The concerns of Planned Parenthood over the moribund privacy analysis of *Roe* are warranted. The scholarly rejection of Roe resulting from its flawed foundation was instantaneous and enduring. *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 185-92 (1989) (sketching numerous critiques of Roe by constitutional scholars).

As a result, abortion rights advocates have been casting about for an alternative constitutional mooring for the abortion right. *See* Bopp, *Will There Be a Constitutional Right to Abortion After the Reversal of* Roe v. Wade*?*, 15 J. Contemp. L. 131 (1989) (discussing and refuting suggested alternatives to *Roe's* privacy analysis). The equal protection theory has been popular among abortion rights advocates, which indicates why it is interwoven with the *Roe* privacy right in the brief of Planned Parenthood in an effort to strengthen the moribund abortion privacy right. However, as demonstrated below, only a radically altered equal protection analysis would accommodate an abortion right. Indeed, traditional equal protection analysis would need to be altered as drastically to accommodate an abortion right as privacy jurisprudence was altered in *Roe* for the same purpose.

A. The Equal Protection Clause Does Not Provide an Abortion Right.

1. Equal Protection Analysis

Although the fourteenth amendment and its equal protection guarantee was originally interpreted to have the "pervading purpose" of protecting "the freedom of the slave race, the security and the firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him," *The Slaughter-House Cases*, 83 U.S. 57,

71 (1873), equal protection was later expanded beyond its original meaning. Scholars have differed concerning the constitutional propriety of extending the equal protection doctrine to gender bias. *Cf.* Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955), *with* R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) (It was never contemplated that "racial and sexual groups needed special protection to the same degree," *id.* at 66 n.*).

This Court has employed three levels of scrutiny in reviewing legislative enactments which classify persons. The lowest level of scrutiny, where no suspect classes or fundamental rights are involved, is the rational basis test. Under this test, this Court's inquiry into the purpose of the classification generally does not go very far. "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (*quoting Flemming v. Nestor*, 363 U.S. 603, 612 (1960)).

Legislation that classifies on the basis of race or national origin, however, has historically been treated with less deference by the Court. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Korematsu v. United States*, 323 U.S. 214 (1944), this Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Id.* at 216. As further developed by this Court, the strict scrutiny test requires that a classification be narrowly tailored to further a compelling government interest. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). This test has come to be applied not only to statutes that classify on the basis of race and national origin, but also those classifications that infringe upon the exercise of a fundamental right by a particular group. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663

(1966); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Recently, in the context of discrimination based on gender (and alienage and illegitimacy), this Court has employed an intermediate test requiring that the legislative classification be substantially related to an important government interest. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

2. *Gender Discrimination*

The intermediate standard of review in the context of gender discrimination requires that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig*, 429 U.S. at 197.

Some gender discrimination cases, however, have not invalidated the statutory distinctions drawn between men and women. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), this Court was required to review a promotion policy of the United States Navy which allowed women a longer period of time for promotion prior to mandatory discharge than was allowed men. *Id.* at 500. The *Schlesinger* Court found that, unlike the statutes at issue in *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers . . . are not similarly situated." *Id.* at 508. Similarly, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), a case dealing with the Military Selective Service Act that permitted only men to be drafted, the Court found that "[m]en and women . . . are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78. The *Rostker* Court went on to say that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial

equality." *Id.* at 79. In both cases, the statutory classification was upheld based on the differences between the sexes.

Thus, in the area of gender discrimination, there is a distinction between those statutory classifications that bear no relationship to actual differences between men and women, and those classifications that are predicated upon those differences. The former are held to a standard of intermediate scrutiny, while the latter are upheld as long as the distinction is rationally related to a legitimate government interest. Nowhere is this same distinction more apparent than in the context of pregnancy regulation.

Geduldig v. Aiello, 417 U.S. 484 (1974), presented the question of whether a state disability insurance program that excluded from coverage disabilities resulting from pregnancy denied women equal protection. *Id.* at 492. This Court found that there was no denial of equal protection because gender discrimination, as previously defined in *Reed* and *Frontiero*, did not exist with respect to the disability plan. *Id.* at 496 n.20. The *Geduldig* court stated that

> [t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id.

Logically, if pregnant women are not similarly situated with respect to nonpregnant persons, a law prohibiting abortion would not be a denial of equal protection to all women as a class, and therefore, not gender discrimination. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 985 (1984).

Therefore, the statute would only need to pass the rational basis test for the purposes of equal protection analysis.

However, under either rational basis scrutiny or intermediate scrutiny, a law restricting abortion ought to be upheld because of the existence of the preborn human being involved. Even some who advocate intermediate scrutiny for abortion restrictions recognize that "abortion uniquely threatens potential life, so that its separate treatment serves purposes that the exclusion of pregnancy from insurance coverage plainly does not." L. Tribe, *American Constitutional Law* 1071 n.6 (1978).[3] Equality of the laws simply cannot and should not be perverted to require an equality of results

[3]Strict scrutiny based on the existence of a fundamental right to abortion is no longer a consideration with the erosion of support for *Roe v. Wade* on this Court. Because traditional equal protection analysis does not provide for heightened scrutiny of abortion restrictions — under gender-based or fundamental rights analysis — abortion rights advocates have sought to create alternative equal protection models. *See* Brief Amicus Curiae of American Victims of Abortion in Support of Petitioners, *Bray v. Alexandria*, No. 90-985 (U.S., *cert. granted*, 111 S. Ct. 1070) (discussing and criticizing these alternative "models"). However, proponents of these alternative equal protection models simply cannot escape the fact that not all women are pregnant women. Even though many women have the capacity to become pregnant, it does not follow that laws that draw distinctions on the basis of reproductive biology discriminate on the basis of gender. Such distinctions do not affect the female gender as a whole. A hallmark of this Court's equal protection jurisprudence is the principle that similarly situated persons be treated equally. There is no similar circumstance to a woman bearing a preborn human being which, for a brief time, is entirely dependent on her for survival — a preborn human being which, in the vast majority of cases, she helped create by consensual activity known to carry with it the possibility of creation of just such a dependent preborn human.

It is true that models such as the "special treatment model" of equal protection would certainly benefit women, just as the poor would benefit from a redistribution of wealth, but this benefit would come at the expense of the constitutional concept of equality under the laws. Ultimately, these special models are not really models of equality — in the sense of equal treatment — but instead serve as a "liberal ratchet" to be used to reach what some believe are socially desirably results. R. Bork, *supra*, at 92 (applying the "liberal ratchet" simile to Justice Brennan's view of section 5 of the fourteenth amendment, which can only go one way according to Justice Brennan's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

ensured by the government among persons who are not similarly situated.

B. Equal Protection Does Not Invalidate the Spousal Notice Provision.

Just as there is no underlying equal protection abortion right, the Pennsylvania spousal notice provision, 18 Pa. Cons. Stat. Ann. § 3209, does not violate the fourteenth amendment guarantee of equal protection — as Planned Parenthood insists, Brief for Petitioners/Cross-Respondents at 40, 46-48 — under any traditional application of equal protection doctrine.

Planned Parenthood argues that "the provision imposes duties on women alone, and confers rights solely on men." *Id.* at 46. Of course, women and men are not equally situated with respect to carrying a child which is the biological offspring of both spouses and whose life may be at risk by a contemplated abortion. Petitioner/Cross-Respondents try to argue some equivalence by saying that men may be sterilized, etc. without giving spousal notice. This, of course, is true, and women may be sterilized without giving spousal notice. But nowhere are men given the option of terminating the life of an offspring already in being, albeit in utero. There simply is no equivalent situation to trigger the equal protection doctrine; the existence of the unborn human being changes all equivalence.

Nor does a spousal notice requirement violate the equal protection clause by promoting sexual stereotypes of the man as the "head and master", or the woman as "need[ing] spousal guidance." *Id.* at 47-48. The requirement simply acknowledges that a father has an interest in an unborn child of which he is a biological parent and seeks in a very minimal fashion to give some recognition of that interest. There is no violation of equal protection in that.

II. The Ninth Amendment Neither Provides a Constitutional Shelter for the Right to Abortion Nor Prevents the Overruling of *Roe v. Wade*

Certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania in the case at bar insist the ninth amendment[1] supports a substantive abortion right and that it protects from overruling an abortion right found elsewhere in the Constitution:

> [t]o accept the invitation to overrule *Roe v. Wade* is to accept an invitation to change the very meaning of the word "rights" in our constitutional tradition — the most profound and dangerous constitutional deviation in the last two centuries. The Court should decline the invitation; *indeed, the Constitution explicitly commands the Court to do so.*

Brief *Amicus Curiae* of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8 (emphasis added).

However, the ninth amendment neither guarantees a right to abortion nor commands that an abortion right once erroneously recognized as a constitutional right be retained.

A. The Ninth Amendment Does Not Provide an Abortion Right.

The ninth amendment's retained rights cannot be a new source of fundamental constitutional rights. This is true because (1) the principle purpose of the ninth amendment was to avoid an implied extension of federal power due to the ratification of the Bill of Rights, (2) retained rights cannot prevail over the delegated powers of the federal government;

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[1]The ninth amendment states in relevant part: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

and (3) the federal courts are not empowered to enforce retained rights against the states.

The ninth amendment declares: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

The ninth amendment has been cited by certain members of this Court and others in support of the concept that there are other protected rights not enumerated in the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]here are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Id.* at 488); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) ("[T]he Constitution's draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed." *Id.* at 579); *Lubin v. Panish*, 415 U.S. 709, 721 n. (1974) (Douglas, J., concurring) (right to vote in state elections). *Cf. Roe v. Wade*, 410 U.S. 113, 153 (alluding to a lower court's reliance on the ninth amendment for a right of privacy reserved to the people but finding the right instead in the fourteenth amendment); *Buckley v. Valeo*, 424 U.S. 1, 59 n.67, 84 n.113 (1976) (per curiam) (campaign spending limits may implicate ninth amendment rights).

This *amicus* has no quarrel with the view that there are other protected rights not enumerated in the Constitution. *See generally* Bopp & Coleson, Webster *and the Future of Substantive Due Process*, 28 Duquesne L. Rev. 271 (1990). However, this *amicus* does dispute the concept that the ninth amendment protects unenumerated rights that conflict with the delegated powers of the federal government or that the

ninth amendment limits the people's authority to constitute state governments.[5]

The natural meaning of the ninth amendment is that the Constitution's enumeration of certain rights does not deny, disparage, expand, or restrict the rights, unenumerated in the Constitution, that are retained by the people under state law. The words, history, and purpose of the ninth amendment demonstrate that it is not a "bottomless well in which the judiciary can dip for the formation of undreamed of 'rights' in their limitless discretion." Berger, *The Ninth Amendment*, 66 Cornell L. Rev. 1, 2 (1980) (characterizing Justice Goldberg's concurrence in *Griswold*). It is, instead, a rule of construction that confirms that the federal government is one of limited powers, and that rights not delegated by the people to the federal government are not to be denied or disparaged simply because they are not enumerated in the Constitution. By definition, then, the "rights retained" do not overlap or trump granted federal powers, nor do they override state powers.

1. *The Principal Purpose of the Ninth Amendment Was to Avoid an Implied Extension of Federal Power.*

As sent to the states for ratification, the Constitution did not include a general bill of rights. This omission provoked considerable opposition to the ratification of the Constitution. *See* G. Wood, *The Creation of the American Republic 1776-1787* 536-43 (1969); E. Dumbauld, *The Bill of Rights and What It Means Today* 10-33 (1957). Two principal arguments were made in opposition to the addition of a bill of rights. First, it was argued that a bill of rights was unnecessary because the federal government was a government of limited, delegated powers.

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[5]This section of this Brief draws heavily from the *Report to the Attorney General, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and Privileges or Immunities Clause*, U.S. Department of Justice, Sept. 25, 1987, at 15-27, which is an excellent discussion of the purpose and intent of the ninth amendment.

James Wilson explained in a widely republished speech that every power

> which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.

Speech of James Wilson (October 6, 1787), 13 *The Documentary History of the Constitution* 339-40 (1981).

Second, it was argued that the addition of a bill of rights would imply that all other rights and powers had been delegated to the federal government. Such an implication was inconsistent with the concept of a government of limited powers and therefore was to be avoided. James Wilson expressed it this way:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an *enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

2 *Elliot's Debates* 436-37 (1836) (emphasis in original). *See also The Federalist*, No. 84, at 579-80 (Hamilton) (referring to a bill of rights as "dangerous" for this reason).

In order to secure its ratification by the states, the federalists agreed to amend the Constitution to include a bill of rights. James Madison proposed the amendments that

eventually became the Bill of Rights. He defended his proposal which became the ninth amendment:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution. . . .

12 *Papers of James Madison* at 206. In this way Madison confirmed his understanding that his proposal operated as a restriction on the implied extension of federal powers.

2. *The Retained Rights Do Not Prevail Over Powers Delegated to the Federal Government.*

In his statement on the House floor introducing the resolutions that, with revisions, became the Bill of Rights, Madison spoke of the role of the courts in enforcing rights:

> It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated; but does it not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights *expressly stipulated* for in the constitution by the declaration of rights.

12 *Papers of James Madison* 206-07 (emphasis added).

This contemporaneous explanation contemplates that courts will serve as an "impenetrable bulwark" against (1) unconstitutional expansions of power and (2) infringement of "expressly stipulated" rights in the Constitution. There is no suggestion that courts are to create and enforce exceptions to granted powers in favor of retained rights. Of course, if, as the traditional interpretation maintains, the retained rights are those not delegated to the federal government, then, to the extent courts are an "impenetrable bulwark" against every "assumption of power" beyond those granted the government, no other specific protection of retained rights is required.

The text, history, and purpose of the ninth amendment all demonstrate that retained rights do not prevail over delegated powers. Thus, the argument that a right to abortion resides within the ninth amendment misinterprets the nature of the ninth amendment. This amendment has been traditionally understood to contradict the concept that the people have abandoned all rights not specifically granted to them in the Bill of Rights. Without the ninth amendment, there was a concern that the Bill of Rights might be misinterpreted to be an implied extension of federal power.

For example, Justice Story explained that the ninth amendment "was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." J. Story, *Commentaries on the Constitution of the United States* § 1905, at 624-25 (4th ed. 1873).

Edward Dumbauld, in his book, *The Bill of Rights and What It Means Today*, stated the purpose of the ninth amendment:

> The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to

> forestall the possibility of misinterpretation of the rest of the document . . . . It is destitute of substantive effect.

E. Dumbauld, *The Bill of Rights and What It Means Today* 63-64.

Because this is true, then the retained rights referred to in the ninth amendment are simply those rights that remain after subtracting the powers delegated to the federal government from the original sovereignty of the people. Thus, retained rights are subordinate to the delegated powers of the federal government and cannot prevail over those delegated powers when they conflict.

Justice Reed stated this in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947): "[W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth . . . Amendment[], the inquiry must be directed toward the granted power under which the action of the Union was taken. If the granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth . . . Amendment[], must fail." *Id.* at 95-96.

The purpose of the ninth amendment was not to expand the powers of the courts in determining the nature of these retained rights, the purpose was to limit the federal government to the powers expressly granted in the Constitution. Justice Black, in his dissent in *Griswold v. Connecticut*, 381 U.S. at 520, stated: "as every student of history knows," the ninth "[a]mendment was passed, not to broaden the powers of this Court or any other department of 'the general government' but . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication."

Activists argue that the focus on rights, rather than powers, in the ninth amendment and in Madison's statement introducing his draft (quoted above), implies that the amendment means something more than that federal powers

are limited. Professor Ely, for example, after quoting Madison's explanation, contends "that even here Madison, though he may have linked them in a way that seems unnatural today, made *both* [points] — that he wished to forestall both the implication of unexpressed powers *and* the disparagement of unenumerated rights. What is more important is that just as the tenth amendment clearly expresses the former point, the ninth amendment clearly expresses the latter." J. Ely, *Democracy and Distrust 36* (1980) (emphasis in original). The point appears to be that unless retained rights trump granted powers, the ninth amendment is superfluous.

This argument depends upon the significance assigned to the use of the words "powers" in the tenth amendment and "rights retained" in the ninth amendment. The change in focus from "powers" to "rights retained" was the cause of some opposition to ratification. Hardin Burnley reported in a letter to Madison that what became the ninth and tenth amendments were initially rejected by the Virginia Assembly. Governor Randolph led the opposition, arguing that it was not possible to determine which rights were retained by the people.

> His principal objection was pointed against the word *retained* . . . and his a[r]gument if I understood it was applied in this manner, that as the rights declared in the [first eight amendments] were not all that a free people would require the exercise of; and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe, & more consistent with the spirit of the 1st. & 17th. amendments proposed by Virginia [which were predecessors to the Ninth and Tenth Amendments], that this reservation against constructive power, should operate rather as a provision against extending the powers of Congress by their own authority, than as a protection to rights reducible to no definitive certainty.

Letter from Hardin Burnley to James Madison (November 28, 1789), 12 *Papers of James Madison* 456 (original spelling retained) (emphasis in original).

In a letter to George Washington, Madison responded to Randolph's argument, contending that it raised, in essence, a distinction without a difference.

> The difficulty [stated] against the amendments is really unlucky, and the more to be regretted as it springs from a friend to the Constitution. It is still a greater cause of regret, if the distinction be, as it appears to me, altogether fanciful. If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured, by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Letter from James Madison to George Washington (December 5, 1789), 12 *Papers of James Madison* 459. Madison thus confirmed his understanding that, notwithstanding the reference to "rights" instead of "powers," the ninth amendment continued to operate as a restriction on the implied extension of federal powers.

Under Madison's and traditional interpretation, the ninth amendment is a companion to the tenth amendment and is not redundant. The tenth amendment affirms that powers not delegated to the federal government are reserved to the states and the people; in other words, it is a statement of *who* possesses undelegated powers. The ninth amendment, on the other hand, concerns the *location* of the line between delegated powers and retained rights, and commands that the line not be moved by virtue of the enumeration of some rights.

Some argue that the "rights retained by the people" refer to "natural rights," theories of which were popular among some at the time of the ratifications of the Constitution and the Bill of Rights, and that those unwritten "natural rights" trump powers. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 152 (1928); B. Patterson, *The Forgotten Ninth Amendment* 19-22 (1955);

Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814, 816 (1966).

The Constitution, however, nowhere incorporates natural law or provides that natural, fundamental, or any sort of higher law is superior to it. To the contrary, article VI provides that the "Constitution," not some higher law principles, "shall be the supreme Law of the Land."

Furthermore, the "rights retained" by the people under the ninth amendment may be delegated to or waived as against a state. Thus, whether the right has been retained by the people as against a *state* depends upon the allocation of governmental powers and individual rights under that state's constitutional law. One would not look to the U.S. Constitution or the federal courts for their origin, description, or enforcement. Certainly, the rights retained by the people could be waived, limited or defined by state law and constitutions pursuant to the actions of the people or their constitutionally empowered legislative representatives. To assert that the retained rights are now incorporated by the fourteenth amendment, including a right to abortion, and that federal courts are now under an obligation to protect such retained rights as against the states, transforms the ninth amendment into a restriction on the people's right to create state governments and to empower those states with such authority as they may constitutionally delegate to them.

Russell Caplan reaches a similar conclusion by focusing on the state-law basis of rights at the time of the Constitution's ratification. He argues that the "rights retained" in the ninth amendment refer only to state-based rights, that those state-based rights do not trump federal powers because of the Supremacy Clause, and that it is logically impossible to "incorporate" the ninth amendment through the fourteenth against the states, because the Amendment was intended to protect, not circumscribe, state-based rights and circumstances. Caplan, *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, 260-62 (1983).

Therefore, the ninth amendment is not substantive in nature. It does not create rights, neither is it a source from which new rights may be created. It is simply a rule of construction, no more, no less.

B. The Ninth Amendment Does Not Prevent the Overruling of Roe.

Just as the ninth amendment can provide no substantive abortion right, neither does it forbid the overruling of *Roe v. Wade*, as argued by certain amici curiae in support of Planned Parenthood of Southeastern Pennsylvania in the case at bar. Brief *Amicus Curiae* of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania at 8. No amount of argument that rights set forth in the Constitution are supposed to be "permanent," *id.* at 6, can legitimately save a right wrongly found to be in the Constitution. If this Court cannot correct errors in constitutional law made by itself, then there is nor cure for constitutional error except for the cumbersome process of constitutional amendment. Whatever the ninth amendment may be determined to do, it is not designed to make error permanent.

III. No Remand Is Necessary to Decide This Case Under the Rational Basis or Undue Burden Standards of Review or Under Alternative Constitutional Claims.

Planned Parenthood asserts that in the event this Court expressly determines that a strict scrutiny privacy theory no longer governs abortion jurisprudence, then this Court should remand for consideration of the provisions — with detailed fact finding — under any new standard established or under alternative constitutional provisions. *Id.* at 5, 9 n.27. However, such a remand is neither required nor desirable.

First, Pennsylvania put on evidence in the District Court below designed to show that it had compelling state interests supporting its abortion restrictions and that its abortion law

was narrowly tailored to give effect to those interests. Because the evidence shows that Pennsylvania's abortion restrictions survive strict constitutional scrutiny, the evidence will show, if any is needed, that the restrictions are constitutional under either an undue burden or rational basis standard of review.

Second, the undue burden test and especially the rational basis tests do not require judicial fact-finding. Rather, the concepts of "undue" and "rational" are capable of rational, not evidentiary proof. Regarding the rational basis test, this Court has declared: "Where . . . there are plausible reasons for [the legislature's] action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (*quoting Flemming v. Nestor*, 363 U.S. 603, 612). Therefore, if any rational basis may be perceived to undergird Pennsylvania's abortion restrictions, then they ought to survive scrutiny. This standard has already been met, in the mind of the appellate court below with regard to all but the spousal notice provision, and even this provision has a basis in rationality, which is recognition in some minimal fashion of the interests of husband in a preborn child which is genetically his as well as his wife's.

Third, where this Court has decided abortion cases under a lower standard in the past, it has not remanded for further consideration by a lower court under the lower standard. For example, in the abortion funding cases, this Court held that a lower standard was applicable than that applied by the lower courts and then proceeded to decide the cases under the lower standard. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). Likewise, in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), this Court did not remand for consideration of possible mootness the provisions of Missouri's abortion statute which banned the use of public funds for "encouraging or counseling a woman to have an abortion," even though such remand was argued for at length in brief of plaintiffs/appellees, Reproductive Health Services, et al. Brief of Appellees at 31-35, *Webster*, 109 S. Ct. 3040.

Fourth, should this Court choose to do so, it certainly has the authority to hold that there is no constitutional right to abortion under a fourteenth amendment privacy theory *or under any other constitutional theory.* Further fact-finding or remand for review by a lower court on these issues would be a waste of federal judicial resources.

CONCLUSION

Roe v. Wade was an exercise of raw judicial power when it was decided, and the Constitution remains unchanged in its lack of any support for an abortion right — under any constitutional theory. *Roe v. Wade* should be expressly reversed and the statutes herein upheld under the rational basis test. In any event, this Court should affirm the decision in No. 91-744 and reverse the decision in No. 91-902.

Respectfully submitted,

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